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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 ANTHONY CAIN,

9 Plaintiff,

10 v.

11 CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,

12 Defendant.

CASE NO. C12-5879 BHS

ORDER ADOPTING REPORT  
AND RECOMMENDATION

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14 This matter comes before the Court on the Report and Recommendation (“R&R”)  
15 of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 18), and the  
16 Government’s objections to the R&R (Dkt. 20).

17 On October 4, 2013, Judge Strombom issued the R&R recommending that the  
18 Court reverse the Administrative Law Judge’s (“ALJ”) finding that Plaintiff Anthony  
19 Cain (“Cain”) was not disabled and remand for further proceedings. Dkt. 18. On  
20 October 18, 2013, the Government filed objections. Dkt. 20. On October 31, 2013, Cain  
21 responded. Dkt. 21.  
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1       The district judge must determine de novo any part of the magistrate judge's  
2 disposition that has been properly objected to. The district judge may accept, reject, or  
3 modify the recommended disposition; receive further evidence; or return the matter to the  
4 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

5       In step two of the five-step sequential evaluation process, the ALJ found that Cain  
6 did not have a severe cognitive disorder. In doing so, the ALJ discounted the opinion of  
7 an examining psychologist, Dr. Andrew Fisher. Judge Strombom found that the ALJ  
8 “failed to provide valid reasons for rejecting the cognitive deficits Dr. Fisher’s opinion  
9 indicate are present.” Dkt. 18 at 9. The Government objects to this finding and argues  
10 that the ALJ did not reject Dr. Fisher’s opinion, the ALJ was merely placing the opinion  
11 in context. Dkt. 20 at 4–6. “[T]he step-two inquiry is a de minimis screening device to  
12 dispose of groundless claims.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996)  
13 (citing *Bowen v. Yuckert*, 482 U.S. 137, 153–54 (1987)). “An impairment or combination  
14 of impairments can be found ‘not severe’ only if the evidence establishes a slight  
15 abnormality that has ‘no more than a minimal effect on an individuals ability to work.’”  
16 *Smolen*, 80 F.3d at 1290 (citing SSR 85-28). Dr. Fisher diagnosed Cain with a moderate  
17 to mild, persistent impairment, which is more than a groundless claim overcoming de  
18 minimus screening procedures. The Court agrees with Judge Strombom that, at this step  
19 of the proceeding, the “ALJ failed to properly explain why [Dr. Fisher’s] finding were  
20 rejected.” Dkt. 18 at 10. Therefore, the Court adopts the R&R on this issue.

21       The Government also objects to Judge Strombom’s finding that the ALJ’s error  
22 was not harmless. The Government argues that Dr. Fisher’s assessment of Cain’s

1 “abilities [does] not equate with disability.” Dkt. 20 at 7. While the Government may be  
2 correct, it is not this Court’s duty to reach that conclusion. A step two error will be  
3 considered harmless when the ALJ considers the excluded impairments later on in the  
4 sequential evaluation. *Hubbard v. Astrue*, 2010 WL 1041553 \*1 (9th Cir. 2010) (citing  
5 *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007)). In this case, the ALJ did not  
6 consider Cain’s cognitive impairments in any other step. Therefore, the Court adopts  
7 Judge Strombom’s conclusion that the error was not harmless.

8 The Court having considered the R&R, the Government’s objections, Cain’s  
9 response, and the remaining record, does hereby find and order as follows:

- 10 (1) The R&R is **ADOPTED**;
- 11 (2) The ALJ’s decision is **REVERSED**;
- 12 (3) The matter is **REMANDED**; and
- 13 (4) The Clerk shall close this case.

14 Dated this 24<sup>th</sup> day of December, 2013.

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17 BENJAMIN H. SETTLE  
United States District Judge

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